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No. 321

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD

AND

GENERAL ELECTRIC COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

The Board in its brief has conceded or failed to take issue with a number of our principal contentions. Consequently, as between Petitioner and the Board the issues have substantially narrowed. The Board admits that Congress intended Section 8(b)(4)(A) to be read as outlawing

only "secondary" strikes and "secondary" concerted refusals. (Bd. Br., pp. 13-15; Pet. Br., pp. 39-46). It does not take issue with our demonstration that the traditional object of primary picketing is to evoke a sympathetic boycott of the primary employer at the situs of a dispute, that sympathetic primary boycotts are essential to effective strike pressure, and that the Act preserves the right to induce neutral employees to engage in a sympathetic primary boycott (Bd. Br., p. 20; Pet. Br., pp. 29-39). Furthermore, the Board admits that Congress conceived of the primary-secondary distinction in traditional terms[1] (Bd. Br., 14-15, n. 3). The Board concedes, also, that it has abandoned the initial *Moore Dry Dock* approach and adopted a new approach (Bd. Br., p. 24). Thus, its ultimate differences with Petitioner reduce to its assertions (1) that its new definitions of the terms "primary" and "secondary" in common situs cases, reflect administrative judgments which the courts cannot disturb (Bd. Br., 50-51); (2) that the *Denver* decision left it free (Bd. Br., p. 14) to jettison the original approach predicated on the terms of the Act, the legislative history, tradition and the common law and to adopt such new definitions (Pet. Br., pp. 46-62); and (3)

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[1] It contends, however, that this is no help in common situs cases because none of the examples cited in the legislative history was a common situs case and allegedly, the situation where two employers are engaged in business at a common situs "does not present a traditional or typical problem" (Bd. Br., p. 42). That assertion, however, ignores the construction situs cases cited in our main brief at p. 27, n. 11.

GE's contention that Congress did not conceive of the primary-secondary distinction in traditional terms (Br., pp. 26-30, 33, 35-36), rests on excerpts which appear to show that Senators Ball and Ellender conceived of minority recognition picketing as a secondary boycott. The conclusive answer is that Congress knew it was not a secondary boycott for Congress enacted Section 8 (b)(4)(c) to deal with the latter problem. See *N.L.R.B.* v. *Drivers Local Union 639*, 362 U. S. 274, 284.

that the duration test which it now says is the essence of the new definitions is compatible with Section 8(b)(4)(A) (Bd. Br., 32-36).

I. THE BOARD'S DECISION IS NOT A PRODUCT OF ADMINISTRATIVE EXPERTISE EXEMPT FROM JUDICIAL REVIEW.

Critical to the Board's brief is its assertion (Br., pp. 24, 50, 51), that the Board's new approach to the primary-secondary distinction is a product of reevaluation of relevant criteria based on "administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the * * * facts". On the basis of this unsupportable assertion it asks this court to conclude that the new approach constitutes "an allowable judgment which [the courts] cannot disturb". The truth is, however, that the new approach was not the product of experience, but of a change in Board personnel. The value judgments it reflects are not based on the relevant statutory criteria, but on economic and political predilections of individual Board members. The "complexities" are not inherent in the problem, but are artificially engendered by the attempt to dress the new approach in the garb of the old (Pet. Br., pp. 76-82). The facts are not "responsibly treated", and, most important of all, the new approach usurps a function which Congress did not delegate to the Board, but reserved to itself. (Pet. Br., pp. 100-103).

In the first place, reevaluation did not begin in 1951, when this Court decided *Rice Milling*, *Denver* and *Langer*.[2] It began in 1953, with the change in composition of the

[2] *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665; *N.L.R.B.* v. *Denver Bldg. and Construction Trades Council*, 341 U.S. 675; *International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694.

Board.[3] Chairman Leedom subsequently admitted t
statutory interpretations were predicated on the "econo
and political views" of the new members. He defen
on the ground that changes "in the interpretation of
law [are] not inconsistent with the statutory scheme of
tinuous change in the personnel comprising the tribuna
102 Cong. Rec. 12076 (3) (July 9, 1956). Member Jenk
recently revealed the new Board members' concept of th
function when, after this Court reversed *Curtis*,[4] he
plained that the Board had decided that case the way
did because "(1) If [the conduct at issue] wasn't agai
the law, it ought to be, and (2) if the Supreme Court
the United States overruled us it would at least bring
the attention of Congress a loophole in the law whic
might remedy."[5] The Board's brief admits that the
definitions of "primary" and "secondary" reflect the vie
of the individual members as to the amount of econo
pressure which is "adequate" for a union to exert on
primary employer in a common sifus case and the amo
of protection against "enmeshment" in a labor disp
which neutral employers should enjoy. (Cf. Br. for P
pp. 80, 86-89, 101 with Board brief, pp. 30, 33-34, 49-

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[3] See 102 Cong. Rec. (March 23, 1956) 5455; 102 Cong.
(July 9, 1956) 12070; 102 Cong. Rec. (July 27, 1956) 15550.
also Wirtz, *Board Policy and Management Relations: "Empl
Persuasion,"* New York University Seventh Annual Conference
Labor, 79, 106 (1954): "* * * the new law of employer persua
traces directly to the results of the national election of 1952 an
the consequent appointment to the Board of a majority more
sponsive than the predecessor majority to the sentiments, or exp
ence, of employers."

[4] *N.L.R.B.* v. *Drivers Local Union 639*, 362 U.S. 274. See B
for Petitioner, p. 103.

[5] Jenkins, *The NLRB's New Thinking—Sixth Months After*,
dress before the Southwest Area Conference on Industrial Relat
at Houston, Texas, May 13, 1960, p. 9.

Far from bearing the hallmarks of expertise, the Board's new approach did not proceed, as the administrative process requires (*Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 92), by articulation of premises underlying a reasoned value judgment applied to particular facts.[6] Often the Board merely recited a variety of facts without explicating the significance of any. Rationalization was offered only afterwards, in subsequent decisions or, more frequently, in the briefs of Board counsel to the courts. In these *post hoc* formulations facts which the Board had ostensibly relied upon were disregarded and new insights supplied.

The series of decisions which begins with this case (see Brief for Petitioner, pp. 89-91), is illustrative. Here the Board stressed that "many of [the neutral] contractors had been working [at Appliance Park] for several years prior" to the present dispute (R. 39; Cf. Bd. Br., pp. 8, 17, 32). But in the *Virginia-Carolina* case, 126 NLRB 905, only a short time later, the Board applied the same rule where the contractors and their employees did not come on to the situs until after the strike began. 126 NLRB, at 908-909. In the instant case the Board stressed that the separate gate had been established for the exclusive use of independent contractors long before the strike (R. 39-40); In *Phelps Dodge*, 126 NLRB 1367, 1371 (Pet. Brief, p. 90, n. 36), the Board reached the same result although the separate entrance was created shortly before and in contemplation of the strike. In *Virginia-Carolina*, 126 NLRB 905, 908, 910 (Pet. Br., p. 90), the Board reached

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[6] Although the new approach dates from December 1953, the Board did not even begin to articulate the rationale until 1955 (see Petitioner's brief, pp. 76-80); the *Crystal Palace* case, in which the Board first undertook to reverse *Ryan* (Bd. brief, pp. 26-27), was not decided until August, 1956.

the same result although the separate entrance was created after the strike. In this case the Board stressed that the entrance to the plant used by the contractor's employees was remote from the other gates and that employees of the primary employer were barred from using it; (R. 38-40, and 38, n. 2, 40, n. 5, 42); in *Gonzales*, 128 NLRB No. 116 (Pet. Br., p. 91), the Board reached the same result where employees of the neutral contractors and of the primary employer used the same entrance.

In the instant case the only rationale the Board offered was that "the Respondent's object in picketing at gate 3-A was to enmesh * * * employees of neutral employers in its dispute with the Company" (R. 42). The majority of the Board did not accept Member Fanning's invitation to rationalize the result in *Moore Dry Dock* common situs terms (R. 45-46).[7] In *Virginia-Carolina* the Board was equally cryptic, admitting only that it had in the *General Electric* case overruled *Ryan*. In *Gonzales* the Board declared that the function of the "duration" test was to determine whether a case fell in or out of the common situs category and that when it did the *Moore Dry Dock* common situs standards apply. Paradoxically, Member Fanning, who unsuccessfully urged the *Moore Dry Dock* common situs approach in the instant case, dissented in *Gonzales*. Now, for the first time, in this Court, Board counsel tells us that the duration test applies here and that its rationale is the difference in degree of potential damage to neutral employers (Bd. Br., pp. 33, 49).

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[7] This followed naturally from *Incorporated Oil*, 116 NLRB 1844, where the Board had declared that absent a simultaneous appeal to employees of the primary employer, common situs criteria are inapplicable. 116 NLRB, at 1847 (Pet. Br., pp. 78-79). There was, of course, no simultaneous appeal to G. E. employers at Gate 3-A.

This history of rationalization is typical of the whole new approach.[8]

More fundamentally, however, the question posed by the Board's defense—that the new definitions represent a judgment which the courts cannot disturb—is whether definitions which reflect the economic and political value judgments of individual Board members as to the weight to be accorded conflicting interests of labor and management are of the kind "which Congress had indicated [are] for the [Board] to make". *Securities & Exchange Commission* v. *Chenery Corporation*, 332 U.S. 194, 209. Did Congress really endow Board members with Humpty Dumpty's

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[8] Compare *Brewery & Beverage Drivers, Local 67 (Washington Coca Cola)*, 107 NLRB 299, decided on the facts without any expressed rationale, with *Albert Evans; trustee of Local 391, Teamsters (Thurston Motor Lines)*, 110 NLRB 748, decided "For the reasons stated by the Board in the Coca Cola case" 110 NLRB, at 754, and *Sales Drivers, Local Union 859 (Campbell Coal Company)*, 110 NLRB 2192, decided "for the reasons stated in *Washington Coca Cola Bottling Works, Inc.*, 107 NLRB 299, aff'd. in *Thurston Motor Lines, Inc.*, 110 NLRB 748", 110 NLRB, at 2194. It was not until *Local 657, International Brotherhood of Teamsters (Southwestern Motor Transport, Inc.)*, 115 NLRB 981, that the Board articulated the reasons it claimed to have stated in *Washington Coca Cola*, reasons based entirely on the Board's notion of what amount of pressure was adequate for a union to exert. See Pet. Br., pp. 86-89. Similarly, compare *Local 618, Automotive Employees Union (Incorporated Oil Co.)*, 116 NLRB 1844, decided narrowly on the basis of the particular facts before it with special emphasis on a finding that the picketing was "harassment", the timing of the appearance of the pickets which was of "paramount significance", and the absence of the primary employees at the picketed site, 116 NLRB at 1846-1848, with *Seafarers International Union (Salt Dome Production Co.)*, 119 NLRB 1638, decided on the sole basis of the absence of primary employees at the picketed site where the other two of the three factors relied upon in *Incorporated Oil* were missing and all other facts indicated an intensive effort to conform the picketing with the law, 119 NLRB, at 1639, 1641.

power to make the words "primary" and "secondary" mean "just what [they] choose [them] to mean—neither more nor less"?[9]

Rice Milling and *Denver* foreclose the claim to such power. This Court carefully examined and approved the Board's initial approach to Section 8(b)(4)(A). 341 U.S., at 692. Approval was predicated on the ground that the Board's approach preserved "the union's traditional right to strike" and to picket (341 U.S., at 673, 687), and condemned only secondary boycotts thereby effectuating *both* of Congress' dual objectives. Thus, this Court held not only that the terms "primary" and "secondary" must be defined consistently with their "traditional" content in order to effectuate Congress' objectives in common situs cases, but also that the Board's initial definitions (see our main brief, pp. 39-61), were valid and proper. Short of overruling these decisions outright it cannot now be argued that Congress left at large the content of the terms "primary" and "secondary"; that it intended definition to turn upon the relative value individual Board members would from time to time assign to conflicting interests of management and labor. Drawing the line between these competing interests was Congress' function. It did not abdicate or delegate the function to the Board. *Local 1976, Carpenters Union* v. *N.L.R.B.*, 357 U.S. 93, 99-100; Pet. Br., pp. 37-39, 43-44, 100-103.

The Board's contrary contention hangs entirely upon transforming this Court's commendation of the Board's initial approach into an invitation to reverse it. The Board accomplishes this legerdemain by simply truncating the "dual congressional objectives" passage of *Denver* (Bd. Br., p. 14) to omit the introduction: "In the views of

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[9] Carroll, *Through the Looking Glass*, Peter Pauper Press, p. 106.

the Board as applied to this case we find conformity with * * *". Having thus eliminated the purpose of the sentence, the Board discerns in the remaining words unbounded authority "to give content to the terms primary and secondary". (Bd. Br., p. 14, n. 3, and accompanying text). And it is on this authority alone that the Board predicates its claim of discretion, to which courts must defer, to declare primary conduct secondary.

Moreover, the Board's reading of this truncated quotation assumes that the "dual Congressional objectives" are in conflict with each other and therefore require "accommodation". (Bd. Br., pp. 14, 50.)[10] This assumption stems from equating the "dual objectives" referred to in *Denver* with the Board's statement in *Moore Dry Dock* that "neither the right of the unions to picket nor the right of the secondary employer to be free from picketing can be absolute". (Bd. Br., pp. 22-23, 27, 29-30, 32-33, 50). However, the equation is completely false. Clearly, between the two so-called rights referred to in *Moore Dry Dock* there is a conflict. To uphold absolute freedom to picket would grant unions a right to engage in secondary picketing. To uphold the neutral's absolute immunity from picketing would deny the right of the union to engage in primary picketing. Necessarily, since both rights cannot coexist, they must be accommodated. However, the "dual objectives" are not these rights. They are not incompatible, inconsistent, or in conflict. The function of the Board under Section 8(b)(4)(A) is to "accommodate" these so-called rights in "conformity" with the dual objectives, as it did in *Denver*, not to "accommodate" Congress' objectives as it seeks to do here.

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[10] The assumption appears clearly in the quotation from *Gonzales* which appears at pp. 29-30 of the Board's brief.

II. THE BOARD'S REDEFINITION OF "PRIMARY" AND "SECONDARY" CANNOT BE JUSTIFIED UNDER *DENVER* AND *LANGER*.

General Electric, in effect, admits that the Board's duration test is untenable for it argues candidly (GE Br., pp. 32-36) that the content of the Union's right to bring pressure to bear on the primary employer must be the same in all cases. Accordingly, it rests its case on denial that Congress meant to preserve the union's "traditional" right to strike and to picket. The Board, on the other hand, concedes that the "traditional" right to strike and to picket includes the right to influence neutral employees "to withhold their * * * services from the struck employer" (Br. p. 20), but contends that this right does not exist in "common situs" cases.

The unarticulated premise of the Board's argument (Bd. Br., pp. 40-42) is that in *Rice Milling* this Court upheld the union's right deliberately to induce employees of neutrals to boycott the primary employer because that was not a "common situs" case, and denied the same right in *Denver* and *Langer* because they were. Thus, while ostensibly yielding to *Rice Milling*, the Board would emasculate it by excluding "common situs" cases and finding that the regular presence at a primary employer's place of business of neutral employers who there serve him makes a common situs case. But the opinions in *Denver* and *Langer* specifically recognized that in those cases the unions were entitled to exercise the same right which the Court had sustained in *Rice Milling*, 341 U.S., at 687-688, 699-700. *Denver* and *Langer* were differentiated on the ground that the union "*conduct* which the Board here condemned is readily distinguishable from that which it declined to condemn in the *Rice Milling* case" (341 U.S.

at 687), [emphasis supplied], not on the ground that the unions' rights were different.

The Board insists (Bd. Br. pp. 18, 20-21, 23, 24, 36), that under the original approach, the union's right to make "overt appeals" to employees of neutral employers in the absence of employees of primary employer was based on a "geographic" test and was limited to cases where the primary employer owned the picketed premises. But when it comes to illustrating the scope of that right, the Board dares cite only *Interborough News* (Bd. Br., p. 21) and it must ignore *Moore Dry Dock*, for there identical non-picket line inducement of neutral employees was held primary and lawful where the situs of the dispute was located at premises owned by a neutral employer. See Brief for Petitioner, p. 57. As late as November 12, 1959, the Board recognized and applied this aspect of the *Moore Dry Dock* holding, *International Organization of Masters, Mates and Pilots, etc.*, 125 NLRB 113, 114, n. 1, 126. Thus the Board's brief fails completely to come to grips with our demonstration (Pet. Br., pp. 46-61) that under the original approach the legality of the union's conduct depended only on whether it limited its appeal for assistance to denial of services to the primary employer at a situs of dispute, not on whether there happened to be a juxtaposition of employers at the situs.[11] Whether and how long

[11] With one exception, the cases which the Board says are inconsistent with our analysis, p. 36, n. 32, were all decided after the new approach was adopted in 1953. The one exception is *Printing Specialties and Paper Converters Union, Local 388 v. Le Baron*, 9 Cir., 171 F. 2d 331. The Board says that case holds illegal inducement of a refusal to unload the truck of an "ally" of the primary employer. But its own citation, 82 N.L.R.B. at 278, explicitly states that the trucker involved had replaced another independent trucker, not the primary employer's own employees. By the very definition set out elsewhere in the Board's brief (p. 39, see also n. 34, pp. 38-39), the independent trucker in *Pacific Scalright* was not an "ally"

neutral employers were present could not make a diffe ence, for under the initial approach inducement of a boy cott of the primary employer at a common situs, like induce ment of such a boycott at a situs occupied by him alone was deemed to have but a single object—to exert primary not secondary pressure.[12]

The Board argues (Br. pp. 19, 35-36, 38, n. 33) that th distinction between services performed *for* the primar employer and services performed *for* other employer should be disregarded because to the extent that the pri mary employer also benefits from the latter, the result are "artificial" and "unrealistic". But the Board doe not deny that all the courts which rejected the "unity o interest" test held that refusal to purchase the offending parties' goods from the offending party himself was a pri mary boycott while holding that refusal to purchase his goods from an intervening third party was secondary (Cf. Bd. Br., p. 37, with Pet. Br., p. 26.) The presen

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of the primary employer. See also *Metal Polishers, Buffers, Plater and Helpers (Climax Machinery Company)*, 86 N.L.R.B. 1243, dis cussed in our main brief at p. 48. The refusals to handle American Iron freight in *Local 1976, Carpenters Union* v. *N.L.R.B.*, 357 U.S 93, 96-97, were not limited to times when the freight was located at a situs of the primary dispute; the refusals were a classic produc boycott allegedly immunized only by a "hot cargo" clause. To th extent that the Court of Appeals decisions which the Board cite in note 32 and in note 19, p. 24, adopt the new "incidental" versu "deliberate" inducement approach evolved by the Board after 1954 they are in irreconcilable conflict with the earlier cases and with such subsequent decisions as those cited at p. 89 of our main brief See also Petition for Writ of Certiorari in *International Hod Car riers etc.* v. *N.L.R.B.*, No. 800, this Term, filed March 11, 1961, pp 10-16.

[12] G.E. of course errs in asserting (Br. p. 18) that Petitioner "ad mits that its activities at [gate 3A had] the deliberate object o forcing the contractors to cease doing any business with the struck employer * * *." Petitioner asserts that its sole object was to pre vent G.E. from obtaining the benefit of any work or services at the situs of the dispute and thereby to exert direct pressure on G.E

Solicitor General pointed out in 1959 that this traditional distinction between primary and secondary in the field of purchase boycotts was the one Congress adopted with respect to work and services in Section 8(b)(4).[13]

Moreover, this Court pointed out in *Denver*, 341 U.S., at 688-690, that it is the statutory scheme itself which impels the conclusion that a union can call a strike of electrical workers in a dispute with a general contractor if the electrical work is being done by the general contractor's own employees, but not if it is being done by employees of a subcontractor. Those who suggested that economically such a result is anomalous urged that uniformity be attained by allowing the union to call a strike of electrical workers even if they were employed by an independent contractor. It was never responsibly suggested that uniformity should be achieved by depriving the union of the right to call a strike among electrical workers who are employed by the primary employer. Yet the Board now proposes to eliminate economically "unrealistic" distinctions by curtailing what has always been regarded as primary pressure. If, as this Court held, symmetry is not to be attained by denying to employers engaged on a common project the same protection against secondary boycotts which is enjoyed by employers who do business with the primary employer at a place which is not a situs of the dispute,[14] *a fortiori* it is not to be attained by emasculating the traditional right to picket.

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[13] Cox, *Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257, 271 (1959).

[14] That the protection was exactly the same is further shown by comparison of *Metal Polishers (Climax Machinery Co.)*, 86 N.L.R.B. 1243, 1251-1252, discussed in Petitioner's brief, p. 48, with *Chauffeurs, Teamsters, Warehousemen and Helpers, (Hoosier Petroleum Co.)*, 106 N.L.R.B. 629, discussed in the Board's brief, p. 25.

III. THE DURATION TEST IS INCOMPATIBLE WITH SEC TION 8(b)(4)(A)

The Board admits that its new approach makes th union's right to exert pressure upon a primary employe vary inversely with the duration of a neutral employer' business at the situs. Fatal to this approach is its assump tion that if two independent businesses are sufficiently en meshed the Board is entitled to curtail the union's tradi tional right to strike against one in order to immunize the other. The single shred which the Board offers to suppor that assumption (Bd. Br. 33, n. 30)—Senator Taft's state ment that Section 8(b)(4)(A) was intended to protect "the business of a third person who is wholly unconcerned in the disagreement"—is wholly inapposite. Senator Taft made it abundantly plain that the only protection Section 8(b)(4)(A) was intended to offer such a business was protection against "secondary boycotts" which were "unlawful * * * at common law." Br. for Petitioner, p. 24.

Since the duration test admittedly attempts to measure the legality of strike pressure by its effect—*i.e.*, magnitude of injury to the neutral employer (Bd. Br. p. 49)—it is defective for the reasons stated by this Court in *Local 1976, Carpenters Union* v. *N.L.R.B.*, 357 U.S., 93, 98-101. The only evils, regardless of magnitude, which Section 8(b)(4)(A) aims to avert are those produced by the precise type of secondary boycotts which the Act condemns. It is impossible, in such a statute, to equate magnitude of injury with proof of violation.[15]

Unlike the second proviso to Section 8(b)(7)(C) of the

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[15] *Schauffler* v. *Local 30, Roofers*, D. Del., No. 2286, decided Feb. 10, 1961, 47 L.R.R.M. 2576, 2578, 2580.

new Act,[16] Section 8(b)(4) does not make the legality of picketing turn on its effect, but only on its object. The question under Section 8(b)(4) is whether injury to the neutral employer is an "object" or an "incidental consequence" of strike action; whether the neutral employer is the union's target or merely an incidental victim. Quantum of effect on the neutral employer has no possible relevance to that inquiry. In any event, there is not a scintilla in either the Board's decisions or in its counsel's briefs which purports to demonstrate the existence of any necessary connection between duration and damage or which undertakes to refute our demonstration (Pet. Br., pp. 98-99), that no relationship between them exists. But, if neutral employers who are enmeshed with the primary employer at the situs of a labor dispute suffer more severely from a labor dispute involving the primary employer than other neutrals who are not so enmeshed, the consequence is attributable solely to the difference in degree of enmeshment, not to any difference in the object of the union's conduct.

Moreover, the Board itself concedes that precisely the same effect upon neutral employers who have a regular place of business at a common situs may be produced by lawful primary picketing as by unlawful secondary picketing. Thus the Board admits that a union can lawfully deliberately induce employees of an electrical supply house to refuse to make deliveries to a picketed non-union sub-

[16] That proviso reads: "* * * *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services."

contractor at a building site, but that it cannot lawfully deliberately induce employees of a carpentry subcontractor to go on strike because of its dispute with the electrical subcontractor. Yet the refusal of deliveries to the electrical subcontractor may tie up the entire project, including the work of the carpentry subcontractor, as completely as a strike of the carpenters. Plainly, a distinction other than effect on the neutral carpentry contractor is required to explain the difference in result in the two cases. Under the *Moore Dry Dock* approach the difference derives from the application of the primary-secondary distinction to the union's conduct; under the Board's view the difference derives solely from the transient nature of delivery service.

The Board says (Bd. Br., pp. 49-50) that its differentiation between different types of neutral employers (e. g., transportation companies on the one hand and building contractors on the other) should not be rejected because "it may be difficult to determine in which category a particular neutral employer falls". But the difficulty lies not in the similarity between different types of employers, it lies in the test itself, which the Board's brief says (Bd. Br., pp. 19, 28, 33, 42, 49), is based on the theory that interests of a neutral employer are entitled to protection only if his employees work at the situs of the dispute "in a continuous and substantial manner".[17] Thus the Board's brief (p. 19, n. 8, p. 41) confirms our charge (Br., p. 98) that the duration test is nothing but a transformation of this Court's finding in *Rice Milling* that picketing of the primary employer at a situs of the dispute is not de-

[17] Indeed, the Board's statement of the test is itself vague. The Board states variously that the test is whether the "neutral employer" (Br., p. 19, 42), "the neutral employees" (Br., p. 19, n. 8, 33, 49) or the "neutral employer and his employees" (Br., p. 28) work at the situs in a substantial and continuous manner.

signed to evoke a stoppage by employees of neutrals elsewhere than at the situs (Br. for Petitioner, pp. 65-66), into a rule of law which makes the object of such picketing turn on whether the employees of neutrals approach the line regularly, or "happen to approach" it sporadically. Since the metamorphosis is wholly arbitrary, application of the distinction predicated upon it must inevitably breed confusion and inconsistency.

Moreover, if the interests of employers who do business regularly at the situs of a labor dispute are entitled to protection at that situs so also are the same interests of employers who do business only intermittently. Plainly, "blanket exclusion of [such] employers as a class is beyond the power of the Board". *Office Employees International Union, Local No. 11, AFL-CIO* v. *N.L.R.B.*, 353 U.S. 313, 318; *Hotel Employees Local No. 225* v. *Leedom*, 358 U.S. 99. Congress would seem to have placed the matter beyond doubt by distinguishing between types of employers in the new Sections 8 (e) and (f), but making no such distinction in Section 8 (b)(4).

Ignoring the *Chenery* rule (*SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-95), Board counsel have invented for this case in this Court (Bd. Br. pp. 32-33), a new finding; *viz.*, that a picket line at the primary employer's premises publicizing a union's dispute with the primary employer may lead employees of neutral employers to believe that their own employer is the target if the neutrals are employed regularly at the situs. But, inasmuch as the neutral employees are being induced to boycott the primary employer only, the picketing cannot possibly constitute a violation. Br. for petitioner, pp. 66, 73-75.[18]

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[18] Cf. *Rice Milling* and *Ryan* where, because the place of business was that of the primary employer to which neutrals came only to serve him, specific identification of the primary employer on the

The "duration" test makes the distinction between u lawful and lawful inducement of neutrals turn on the exte of the work stoppage by neutral employees which occu when a picket line is respected by those who work reg larly at the picketed situs, on the one hand, and by tho who work there only occasionally, on the other. This di tinction is precluded by the plain terms of the Act. A agree that Congress prohibited "partial no less than tot refusals to work." (Bd. Br., p. 37). Consequently, if i ducement not to serve the primary employer behind picket line is held to have the prohibited object wher the service involved is extensive, it must necessarily b held to have the same prohibited object where the servic involved is transitory or meager. *Per contra*, if, as th Board concedes, refusal to perform services which ar transitory or meager for the primary employer at a situ of the dispute is not an unlawful secondary refusal, the refusal to perform extensive or regular services for hi there cannot be a secondary strike. Because partial n less than total refusals are outlawed, how large or sma a part of the neutral employees' work consists of servin the primary employer can make no legal difference.

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picket sign was not required (Br. for Petitioner, pp. 50, 63, 66, 73 with *John A. Piezonki, d/b/a Stover Steel Service* v. *N.L.R.B.*, Cir., 219 F. 2d 879, a true common situs case, where such identifica tion was required. See Petition for Writ of Certiorari in *Inter national Hod Carriers, Etc.* v. *N.L.R.B.*, No. 800, this Term, p 12, n. 6.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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